STATE OF MICHIGAN
IN THE SUPREME COURT

COALITION PROTECTING AUTO NO-FAULT (CPAN), MARTHA E. LEVANDOWSKI, GERALD E. & MARY ELLEN CLARK, A. MICHAEL AND PAULINA M. DELLER, and M. THOMAS DELLER,

Plaintiffs-Appellants,

v.

THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION (MCCA),

Defendant-Appellee

and

BRAIN INJURY ASSOCIATION OF MICHIGAN (BIAMI), RICHARD K. & ILENE IKENS, DR. KENNETH & SUSAN WISSER, GREGORY A. & KAREN M. WOLFE, AND OTHER SIMILARLY SITUATED MICHIGAN AUTOMOBILE POLICY HOLDERS

Plaintiffs-Appellants,

v.

THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION (MCCA),

Defendant-Appellee.

Supreme Court Case No. 150001

Court of Appeals Case No. 314310

Ingham County Circuit Court
Case Nos. 12-68-CZ, 12-659-CZ
(Consolidated)

Honorable Clinton Canady III

ORAL ARGUMENT REQUESTED

150001
reply

REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL OF PLAINTIFFS-APPELLANTS COALITION PROTECTING AUTO NO-FAULT ("CPAN"), BRAIN INJURY ASSOCIATION OF MICHIGAN ("BIAMI") AND NAMED INDIVIDUALS

THIS APPEAL REQUESTS A RULING THAT A MICHIGAN STATUTE IS UNCONSTITUTIONAL AND INVALID

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I. The Legislature Cannot Statutorily Exempt Itself From the Constitutional Limitations Upon Its Lawmaking Authority.

Neither the Court of Appeals nor MCCA has addressed what is perhaps the most significant underlying issue raised by this appeal: whether the Legislature is empowered to statutorily exempt itself from the limitations Art IV, §25 imposes upon its power to enact laws. MCCA's entire argument rests upon the FOIA exemption contained within MCL 500.134 of the Michigan Insurance Code. When that statute was enacted years after the adoption of FOIA, the Legislature did not reenact or republish FOIA to include the new exemption, as required by Art. IV, §25 of the Michigan Constitution.[1]

The Court of Appeals held, and MCCA argues, that re-publication was not required because the Legislature drafted Section 13(1)(d) of FOIA, MCL 15.243(1)(d), in a manner to allow future statutory exemptions without the need to revise or amend FOIA and thus the new FOIA exemption contained in MCL 500.134 "did not revise, alter or amend FOIA." *Coalition Protecting Auto No-Fault v Michigan Catastrophic Claims Assn*, 305 Mich App 301; 852 NW2d 229, 237 (2014). The underlying premise for this rationale is that it is constitutionally permissible for the Legislature to statutorily exempt itself from the §25 re-publication requirement by giving itself permission to place amendments in other code provisions (contrary to what §25 would otherwise require).

MCCA devotes not a word to this "tower of cards" premise. The Court of Appeals also overlooked it, even declining to address it on reconsideration. But it is clearly an issue of utmost

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[1] Section 25 states "No law shall be revised, altered or amended by reference to its title only. The section or sections of the act altered or amended shall be re-enacted and published at length."

jurisprudential importance. MCCA points to "dozens of other statutes" outside of FOIA that provide for a FOIA exemption and argues that the validity of this legislative practice should be upheld so "all of these [other] statutes" will not be declared infirm. In other words, MCCA argues that the legislative by-pass of §25 must be upheld because "[i]f the passage of the MCCA exemption violated Article IV, §25, then so did the passage of all of these statutes" and "[s]uch a result cannot stand." MCCA Resp. at 26. Quite obviously, a constitutional violation does not become permissible through repeated infractions. If the Legislature has exceeded its legislative power in enacting FOIA exemptions without republishing FOIA, the remedy going forward is to reenact FOIA to include those exemptions.

The Legislature is not the final arbiter of the constitutionality of its actions. It cannot give itself permission to disregard the mandate of §25. Leave to appeal should be granted.

II. Even if, Arguendo, MCL 500.134 and MCL 15.243(1)(d) Are Not Constitutionally Infirm, They Do Not Have the Meaning Attributed to Them By MCCA.

Because the Legislature is not empowered to statutorily exempt itself from the limitations imposed by Art. IV, §25 of the Michigan Constitution, MCL 500.134 and MCL 15.243(1)(d) are constitutionally infirm. However, even if, arguendo, the statutes are deemed to be valid legislative enactments, MCCA's assertion that they permit a public body to completely exempt itself from the reach of FOIA is textually and grammatically incorrect. As Plaintiffs have explained in the Application, nothing in the plain language of the statutes supports the wholesale exemption of MCCA itself.

Further, if a wholesale exemption of MCCA had been the Legislature's intent, the exemption would have been placed within the FOIA definition of "public body," which appears at Section 2(d) of FOIA, MCL 15.232(2)(d). That provision exempts only one "public body" from the reach of FOIA – the judiciary. MCL 15.232(2)(d)(v) provides:

> The judiciary, including the office of the county clerk and employees thereof when acting in the capacity of clerk to the circuit court is not included in the definition of public body.

MCCA, clearly a public body, seeks to achieve the same result despite the absence of any such exemption in the public body provision. It essentially urges this Court to amend the public body statute by implication.[2]

The language alterations MCCA advocates in MCL 500.134 and MCL 15.243(1)(d) to express its desired meaning cannot be read into the statutes. Nor can an unexpressed exemption be read into the public body provision. Except for the judiciary exemption, all of the FOIA exemptions are record-specific. The statutory interpretation adopted by the Court of Appeals is erroneous and should be corrected.[3]

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[2] MCCA continues to argue that the Legislature did not intend MCCA to be a public body, relying upon Section 2 of Public Act 1988, No. 349 that never made it into the body text of MCL 500.134. MCCA's Resp. at 14. That section, titled Legislative Intent, includes language providing in part that the intent of the act is "to further assure that the associations and facilities mentioned in this amendatory act, and their respective boards of directors, shall not hereafter be treated as a state agency ***or public body***" (emphasis added). However, Public Act 1988, No. 349 only references "Section 1" when describing the manner in which MCL 500.134 is to be amended. Consequently, the language that MCCA urges this Court to elevate over the very words of the statute itself ***is not part of the text of MCL 500.134***. It appears in the compiled law as an editor's note without the title "Legislative Intent." The actual words used in the statute state in part that "[a]n association or facility or the board of directors of the association or facility is not a state agency." The reference to "public body" is omitted. MCCA's reliance upon legislative history in contradiction of the statute itself should be rejected. *See e.g., Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000)(rejecting an attempt to use a statute's history to contradict its clear terms). Further, in determining that MCCA is not a state agency for purposes of the Administrative Procedures Act ("APA"), this Court in *League General Ins Co v Michigan Catastrophic Claims Assoc*, 435 Mich 338; 458 NW2d 632 (1990), had no occasion to decide whether MCCA was a public body for purposes of FOIA.

[3] MCCA argues that "it wants it be clear that it is not being secretive" in denying Plaintiffs access to these documents "but rather, is complying with a legislative mandate under MCL 500.134" (MCCA's Resp. at 38). The Legislature did not ***mandate*** the nondisclosure of MCCA's records; rather, in making the purported MCL 500.134 exemption "pursuant to section 13 of the freedom of information act," the Legislature incorporated FOIA's permissive nature. *See* MCL 15.243(1), which provides that "[a] public body ***may exempt from disclosure*** as a

(Footnote continued . . .)

III. *Shavers* is the Controlling Legal Authority That Governs the Issues in This Case and It Has Not Been Supplanted By Statutory Enactment; Nor Has the Legislature Passed Any Law That Regulates MCCA's Calculation of Premium Assessments.

A. MCCA Refuses to Acknowledge the Unique and Ongoing Vitality of the Special Rules Articulated by This Court in *Shavers*.

MCCA refuses to acknowledge the overriding significance of this Court's constitutional pronouncement in *Shavers v Attorney General*, 402 Mich 554; 267 NW2d 72 (1978). In *Shavers*, this Court held that due to the compulsory nature of No-Fault automobile insurance, due process required that auto insurance be available at "fair and equitable" rates and further required that policyholders have access to the rate-making information they need to determine how their rates are computed. *Id.* at 601-603. Nothing has happened in the intervening 36 years to supplant this landmark *Shavers* holding. It remains as vitally important today as it was in 1978. In fact, *Shavers* continues to be cited by this Court. *See e.g., Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 218; 815 NW2d 412 (2012) ("in choosing to make no-fault insurance compulsory for all motorists, the Legislature has made the registration and operation of a motor vehicle inexorably dependent on whether no-fault insurance is available at fair and equitable rates") (internal quotations omitted). And because *Shavers* imposes a ***constitutional standard*** on the rate-making process, it trumps any statute that is inconsistent with the constitutional requirements it articulates.

At the time of *Shavers*, and continuing today, the Insurance Code prohibited rates that were "excessive, inadequate, or unfairly discriminatory." *Shavers*, 402 Mich at 600 (*quoting* MCL 500.2403). Considering that statute, this Court concluded that it did not do all that was

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public record ..." (emphasis added). If MCCA does not want to be secretive, it can easily produce the requested documents. Nothing in MCL 500.134 or FOIA is standing in its way.

constitutionally required and although the Legislature had provided some protection, *significant deficiencies remained*:

> First, the entire rate structure is suspect. The statutory stricture against "excessive, inadequate or unfairly discriminatory" rates is without the support of clarifying rules established by the Commissioner, without legislatively sufficient definition, and without any history of prior court interpretation. The legislative due process mandate is thus reduced to mere exhortation."

Id. at 602. This Court also concluded that rate-payers did not have the information they were constitutionally entitled to have in order to evaluate and challenge the fairness of their rates:

> We therefore conclude that Michigan motorists are constitutionally entitled to have no-fault insurance made available on a fair and equitable basis. The availability of no-fault insurance and the no-fault insurance rate regulatory scheme are, accordingly, subject to due process scrutiny.
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> * * *
>
> [T]he present system of rate regulation denies due process to the motorist attacking the validity of a rate. Filings and supporting information submitted by insurers are open to public inspection only after the filing becomes effective. MCL 500.2406; MSA 24.12406. This certainly is questionable due process.
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> * * *
>
> Individuals must have the knowledge necessary to protect themselves against erroneous or discriminatory underwriting and rate-making decisions.

Id. at 600, 602, 606. Nothing in the Essential Insurance Act supplants these constitutional standards. Indeed, the Legislature is not at liberty to preempt or diminish in any way the constitutional rights and protections pronounced by this Court.[4] Moreover, it would be foolish to

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[4] The *Shavers* plaintiff was apparently satisfied with the framework provided by the Essential Insurance Act and, as this Court noted in *Shavers II*, made no further claim that the No-Fault Act, as amended, was unconstitutional. Plaintiff's decision not to pursue its constitutional challenge in *Shavers II* does not vacate *Shavers* or negate this Court's recognition of a due process right to the information necessary to determine whether compulsory insurance rights are fair and equitable. This Court made this clear in the *Shavers II* order, stating that the order should not be construed as foreclosing future constitutional challenges "based upon the concerns expressed in our opinion."

contend that the passage of the Essential Insurance Act addressed any constitutional deficiencies in the operation of the MCCA when there is nothing whatsoever in that statute that deals with the MCCA.[5] Ever since the *Shavers* decision came down it has been the rule that if rates are not fair and equitable or if rate-payers are denied access to the information needed to determine whether their rates are fair and equitable, as is the case here, the right to due process is triggered and must be given effect, regardless of what any statute says or does not say.

B. MCCA Is Not Regulated With Respect To Premium Calculations.

There is neither a legal nor factual basis for the Court of Appeals' holding that MCCA's premiums are sufficiently regulated to negate or satisfy the constitutional standards imposed by *Shavers*. In fact, ***MCCA has repeatedly emphasized in the context of this appeal that the purpose of MCL 500.134 was "to avoid State control and regulation" over MCCA***. *See* MCCA's Resp. at 35 (emphasis added). Nothing in MCL 500.3104(7)(b) or in any other Insurance Code provision regulates the calculation of MCCA's premium assessments, the factors to be considered, or how they are to be applied. Nor is the DIFS Director given authority to regulate MCCA's premium assessments. MCCA is not required to make, or obtain approval of, the annual rate-filings that auto insurers must make. There is nothing in MCL 500.3104 that requires the Director to approve MCCA's assessments before or even after they are issued.

In fact, the DIFS Director (through his designee) denied CPAN's May 21, 2013 FOIA request for the same rate-making data at issue in this appeal "because that information does not

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[5] MCCA is not governed by the Essential Insurance Act and it has no bearing on MCCA's premium assessments.

exist within DIFS."[6] This rate-making data is what MCCA uses to set rates. It does not exist on MCCA's website and is not otherwise available. As Mr. Angoff explains in his affidavit (Exhibit 12), Plaintiffs' request is "narrow, specific and focused," designed to obtain the rate calculation information Plaintiffs need to determine whether MCCA's per-car assessment is fair, equitable and justifiable.[7]

IV. FOIA Does Not Preempt Plaintiffs' Common Law Right to Access Information.

In section "V-A" of its Response, MCCA argues that the Legislature "clearly designated specific limitations and exceptions to the common law right to access documents through MCL 500.134" (MCCA Resp. at 40). This is not true. The only specific reference in Section 134 is to section 13 of the FOIA. Nothing in MCL 15.213, or in the FOIA policy statement, or in the Preamble to the FOIA evinces any intent to foreclose common law rights.

Whether a statute preempts the common law is a question of legislative intent and "[t]he first step in ascertaining legislative intent is to look at the words of the statute itself." *Wold Architects & Eng'rs v Strat*, 474 Mich 223, 233; 713 NW2d 750 (2006). *Dawe v Bar-Levav & Assoc*, 485 Mich 20, 28; 780 NW2d 272 (2010), ruled that the Legislature should "speak in no uncertain terms" when it modifies the common law. MCL 15.243(3) speaks in no uncertain terms:

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[6] This basis for denial pertains to items 1, 4, and 5 of requests prepared by Jay Angoff and submitted to the DIFS Director by CPAN. Plaintiffs will file a motion to supplement the record to include the FOIA request and the DIFS Director's response.

[7] The idea that giving effect to *Shavers* would mean that every insurer and every vendor from doctors to repair shops would have to open their private books and records to public examination is not constructive argument and does nothing to advance the discussion. The information Plaintiffs request is very discrete. It does not embrace the exaggerated breadth MCCA portends to distract the Court.

This Act does not authorize the withholding of information otherwise required by law to be made available to the public . . . . (emphasis added).

The common law right of access to documents continues to co-exist alongside FOIA. *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 584; 475 NW2d 304 (1991); *Walen v Michigan Dep't of Corrections*, 443 Mich 240; 505 NW2d 519 (1993).

V. Plaintiffs Enjoy A Right of Access to MCCA Documents – Even if Private.

In footnote 20 to its Response, MCCA misstates Michigan common law. It argues that "... Michigan courts have repeatedly held [that the common law right of access] applies only to *public* records."[8] MCCA ignores *Woodworth v Old Second Nat'l Bank*, 154 Mich 459; 117 NW 893 (1908), a common law case which permitted inspection of private records.[9] Defendant compounds its error by misrepresenting the holding of the *Woodworth* case.[10]

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[8] MCCA cites four cases, including *Nowack, supra; Booth News v Muskegon Probate Judge*, 15 Mich App 203; 166 NW2d 546 (1968); *Burton v Tuite*, 78 Mich 363, 375-376; 44 NW 282 (1889); and *In re Buchanan*, 152 Mich App 706, 713-714; 394 NW2d 78 (1986). Not one of those cases recites or stands for the proposition that the common law right of access applies only to public records. The right of access to private records was never discussed.

[9] MCCA insists on mischaracterizing Plaintiffs' argument to this Court, as it did to the Court of Appeals, stating that "Plaintiffs appear to backtrack from their own arguments before the Court of Appeals and now argue that the main case they relied on for their common law arguments, *Nowack v Auditor General*, . . . was used only to show the nature of the interest required at common law to enable one to secure access to records" (MCCA Resp. at 42). Plaintiffs have never changed their position in this regard. Not only was that the position of the BIAMI Plaintiffs in the Court of Appeals, that position was first set forth at pages 8-11 of the BIAMI Plaintiffs' Circuit Court Motion for Summary Disposition. As pointed out in our Application, MCCA misrepresented Plaintiffs' position to the Court of Appeals, which erroneously adopted MCCA's misstatements as shown by the lower court's inaccurate conclusion as follows: "Plaintiffs' argument that a 'special interest' vests an individual with the right to inspect private records under *Nowack* is also without legal merit." *Coalition Protecting Auto No-Fault v Michigan Catastrophic Claims Assn*, 305 Mich App 302; 852 NW2d 229 (2014). Plaintiffs never made such an argument.

[10] MCCA argues that *Woodworth v Old Second Nat'l Bank*, 154 Mich 459; 117 NW 893 (1908), involved "stockholders" (MCCA Resp. at 42, fn 21). This is misleading. Woodworth was a stockholder in an entirely different corporation – the Old Second National Bank.

(Footnote continued . . .)

Again, Michigan's common law right of access to public and private information evolved from the English common law and was incorporated into the Michigan Constitution:

> [I]n our earliest Constitution, by way of the ordinances of 1787 for the government of the Northwest Territory, *we adopted what was in essence the English common law in existence on that date.*

Phillips v Mirac. Inc, 470 Mich 415, 426 n 10; 685 NW2d 174 (2004) (emphasis added.). Finally, while taking language out of context from *McBurney v Young*, 569 US ___; 133 S Ct 1709; 185 L Ed 2d 758, 770-771 (2013), MCCA ignores the *McBurney* court's clear statement that at common law, "***those persons who had a personal interest in non-judicial records were permitted to access them.***"

Oddly, MCCA cites a case handed down in 1800 – *Mayor of Southhampton v Graves*, 8 T.R. 591; 101 Engl. Reports 1563. Contrary to MCCA's assertion, the *Graves* case did not overrule the prior cases discussed therein. ***It only overruled an earlier ruling in the same case from the prior term.*** However, the *Graves* case must be disregarded because it was not a part of the English common law "in existence" at the time of the adoption of the Northwest Ordinances of 1787. As such, it was never incorporated into the Michigan common law and is not encompassed within the purview of Const. 1963, Art III, sec 7.

MCCA dismisses the cases of *Mayor of Lynn v Denton*, 1 Term Rep 689; 99 Eng Rep 1322 (1787); *Corp of Barnstable v Lathey*, 3 Term Rep 303; 100 Eng Rep 588 (1789); *Mayor of*

Woodworth claimed that he was defrauded into purchasing shares of the bank – in part based on false representations as to the value of assets held by Maltby Cedar. Petitioner sought to inspect records of the Maltby Cedar Company – a separate corporation in which petitioner held no ownership interest. Woodworth was listed as the owner of one share of Maltby for which he paid nothing. As this Court stated: "The Maltby Cedar Company was a mere instrumentality of the bank itself, in which ***all of the stockholders of the bank had at least an equitable interest*** ...." (emphasis added). Under the circumstances, this Court treated plaintiff as if he were a shareholder – because of his "equitable interest."

the City of London and Swinland, Term Pasch 4, Geo II; 94 Eng Rep 306 (1731) ; and *Geery v Hopkins*; 2 Ld Raym 852; 92 Eng Rep 69 (Circa 1694-1732), because the records therein were sought for the purpose of litigation. They concede the holding in those cases that the parties were entitled to inspect "private" documents "in the course of pending litigation." But, MCCA says that such is "not the fact pattern presented here" (MCCA Resp. at 43).

Why not? Plaintiffs do not seek this information in a vacuum. Plaintiffs have alleged in their respective complaints – to which no answer has been filed – that they are entitled by statute and under *Shavers* to insurance rates which are not excessive, that they are entitled to rate setting information that has not been filed with the DIFS Director and that such information directly impacts on the insurance rates they are required to pay under penalty of criminal sanction. Obviously, these documents are being sought "in the course of pending litigation."

RELIEF REQUESTED

Plaintiffs-Appellants therefore request that this Court grant their application for leave to appeal and peremptorily reverse, or reverse after hearing, the erroneous decision of the Court of Appeals and reinstate and affirm the Trial Court's December 26, 2012 Order.

Dated: October 14, 2014

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